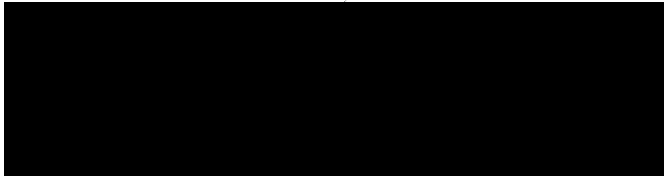




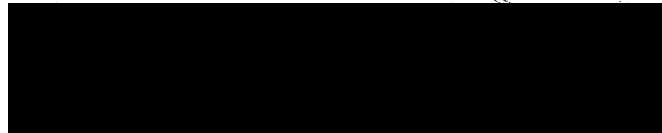
U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 004 54309 Office: CALIFORNIA SERVICE CENTER Date: OCT 13 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a law office. It seeks to employ the beneficiary permanently in the United States as a legal assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 16, 1999. The proffered wage as stated on the Form ETA 750 is \$3,700 per month, which equals \$44,400 per year.

On the petition, the petitioner stated that it was established during October 1993 and that it employs two workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted a copy of the petitioner's owner's Schedule C from her 2001 Form 1040 U.S. Personal Income Tax Return. That Schedule C demonstrates that during 2001 the petitioner was held as a sole proprietorship and returned a profit of \$131,539.

Because, the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on February 3, 2003, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date.

Because the evidence demonstrated that the petitioner is held as a sole proprietorship, the Service Center requested evidence pertinent to the petitioner's owner's monthly expenses. The Service Center also noted that if the petitioner's owner would rely on her own assets to pay the proffered wage, she must provide evidence of those assets. Finally, the Service Center specifically requested the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, the petitioner submitted the petitioner's owner's 1999, 2000, and 2001 Form 1040 U.S. Individual Income Tax reports. The 1999 Schedule C shows that the petitioner earned a profit of \$48,762 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$52,704 during that year, including all of the petitioner's profits.

The 2000 Schedule C shows that the petitioner made a profit of \$79,127 during that year. The Form 1040 shows that the petitioner's owner declared adjusted gross income of \$71,041 during that year, including all of the petitioner's profits offset by various deductions.

The 2001 return shows that the petitioner declared adjusted gross income of \$99,315, including the profit of \$131,539 mentioned above, offset by various deductions.

The petitioner's owner stated that she was unable to provide copies of her 2002 tax return, as it had not yet been filed. As to the request for information pertinent to her monthly expenses, the petitioner's owner stated:

Since this requirement is irrelevant to the subject matter and does not lead to the discovery of findings in the evaluation of the subject I-140 petition, as well as the information seeking will cause this petitioner undue burden and unwarranted expenses in the preparation, I find [sic] that this requirement invades my privacy. I am therefore exercising my right to be protected under the Privacy Act.

The petitioner did not provide the requested Form DE-6 reports and gave no reason for that omission. The petitioner also stated the amounts it allegedly paid for "Outside Services" and "Translator Services" during those years. The petitioner gave no indication of what portion of those services, if any, the beneficiary would obviate if the petitioner were allowed to employ him.

Finally, the petitioner stated,

It is also a common recognition [sic] that an employer's ability to pay is not mandated [sic] by the employer's net profit for the previous year as not commensurated [sic] with the salary specification of the labor certification, where there is evidence that the size of the employer's business has increased, there are reasonable expectations of continued increase in business,

and the employer's [sic] has the present ability to meet the salary stipulated in the labor certification.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on May 28, 2003, denied the petition.

On appeal, the petitioner's owner states that she would submit a brief demonstrating that the decision of the director was arbitrary and "neither logical nor supportive." [sic] The petitioner's owner also stated that she would submit additional evidence.

Subsequently, the petitioner's owner submitted a brief. Appended to that brief were (1) copies of bank statements pertinent to an account held by the petitioner's owner, (2) the 1998 Form 1065 U.S. Partnership Return of Income of what was apparently the petitioner's owner's previous firm, (3) the petitioner's owner's 1998 Form 1040 U.S. Individual Income Tax Return, (4) copies of income tax returns previously submitted. Counsel still did not provide the California Form DE-6 quarterly reports previously requested.

In the appeal brief, the petitioner's owner stated that the documents presented demonstrate that she has limited monthly expenses because she lives in her parents' house and is unmarried. The petitioner's owner stated that her monthly expenses include a mortgage, the monthly payment toward which she declined to specify, and utilities, which she described as limited but did not quantify. Counsel stated that she was waiving her right to be protected under the Privacy Act.

Because the priority date in this matter is August 16, 1999, evidence of the petitioner's owner's personal income and assets during 1998 and evidence of the income of a firm she then worked for is not directly relevant to the instant petitioner's continuing ability to pay the proffered wage beginning on the priority date. The information the petitioner's owner provided pertinent to 1998 will not be further addressed.¹

The petitioner requests that the AAO approve the petition based upon additional evidence provided on appeal, the petitioner's owner's monthly budget, that the petitioner declined to provide earlier, despite a direct request. The petitioner cited the Federal Right to Privacy Act for that refusal, and stated that the requested information was irrelevant, and stated that providing it would be inordinately expensive and burdensome. No portion of the Privacy Act obviates the petitioner's obligation to prove its ability to pay the proffered wage. This office also questions how expensive and burdensome preparation of a monthly budget could have been for the petitioner and the petitioner's owner. The remaining issue in determining whether provision of that budget was properly requested is the issue of its relevance.

The petitioner is a sole proprietorship. As such, the petitioner's owner is obliged to pay the petitioner's debts and obligations out of her own income and assets. The income and assets of the petitioner's owner, therefore,

¹ The instant petitioner is The Law Offices of [REDACTED] a sole proprietorship. The 1998 partnership return is for [REDACTED] at Law. Because the last name of the petitioner's owner is in the title of that partnership, the petitioner's owner was presumably one of the partners of, and worked for, that firm. That assumption, if true, raises the question of the veracity of the statement, on the Form I-140 petition, that the petitioner, The Law Offices of [REDACTED] the sole proprietorship, was established during October 1993. The decision in this matter does not rest, however, on that basis.

as well as the income and assets of the petitioner itself, are funds available to pay the proffered wage. The total amount of the petitioner's and the petitioner's owner's income and assets cannot, however, be used to pay the proffered wage. The petitioner is obliged to demonstrate that, after all of its expenses were paid, and after subtraction of whatever amount the petitioner's owner personally requires, sufficient funds remained to pay the proffered wage during each salient year. Therefore, the petitioner's owner's expenses were relevant to a material issue. Further, if the petitioner wished to rely on the petitioner's owner's personal assets as evidence of its ability to pay the proffered wage, the petitioner was also obliged, as was stated in the request for evidence, to provide evidence of those assets.

The request for that evidence stated, "all items [of the petitioner's monthly budget] may be subject to verification." Such investigation is manifestly the province of the Service Center, and not of this office. By declining to provide the requested evidence when it was sought, the petitioner foreclosed the possibility of the Service Center conducting an investigation relevant to a material issue. Submission of part or none of the requested evidence constitutes a request for a decision based on the evidence of record. Failure to submit requested evidence that precludes a material line of inquiry shall be a ground for denying the petition. 8 C.F.R. § 103.2(b)(14).

The priority date is August 16, 1999. The proffered wage is \$44,400 per year. During 1999 the petitioner's owner had adjusted gross income of \$52,704. Although that amount is greater than the proffered wage, to expect the petitioner's owner to pay the proffered wage out of that amount and support herself on the remaining \$8,304 is unreasonable. The petitioner submitted no evidence of any other funds which were available to pay the proffered wage during that year. The petitioner did not show the ability to pay the proffered wage during 1999.

During 2000, the petitioner's owner declared adjusted gross income of \$71,041. That amount is greater than the proffered wage. If the petitioner's owner paid the proffered wage out of that amount, she would be left with \$26,641. No evidence was before the Service Center from which it might have determined whether the petitioner's owner could have supported herself on that remaining amount. The Service Center was correct in finding that the petitioner failed to demonstrate the ability to pay the proffered wage during 2000, and this office shall leave that finding undisturbed.

During 2001, the petitioner's owner declared adjusted gross income of \$99,315. If the petitioner's owner had paid the proffered wage out of that amount, a difference of \$54,915 would have remained. No evidence was before the Service Center from which it might have determined whether the petitioner's owner could have supported herself on that remaining amount. The Service Center was correct in finding that the petitioner failed to demonstrate the ability to pay the proffered wage during 2001, and this office shall leave that finding undisturbed.

The petitioner failed to submit evidence sufficient to show that it had the ability to pay the proffered wage during 1999, 2000, and 2001. Therefore, the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner also declined to provide requested

evidence² in a timely manner, which refusal, as was stated above, precluded a material line of inquiry, which is a ground for denial. For both reasons, the appeal will be dismissed.

Should the petitioner wish the service to consider the evidence submitted on appeal, the petitioner may file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to the status sought under the immigration laws.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

² Specifically, the petitioner did not provide its owner's monthly budget to the Service Center prior to the deadline for responding to the request for evidence.